In The

Supreme Court of the United States

No. 79-149

MARY LYONS,

Petitioner,

vs.

HONORABLE WARREN K. URBOM, Judge of The United States District Court For The District of Nebraska,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF MANDAMUS AND PROHIBITION, OR IN THE ALTERNATIVE FOR A WRIT OF INJUNCTION OR OTHER APPROPRIATE EXTRAORDINARY RELIEF DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

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MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF MANDAMUS AND PROHIBITION, OR IN THE ALTERNATIVE FOR A WRIT OF INJUNCTION OR OTHER APPROPRIATE EXTRAORDINARY RELIEF DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

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Now comes Mary Lyons, petitioner, by her attorney, John H. Kellogg, Jr., and moves that the Court grant her leave to file the Petition for a Writ of Mandamus and Prohibition, annexed hereto, and that agreeably to its prayer, the Respondent, the Honorable Warren K. Urbom, United States District Judge For the District of Nebraska, be commanded to apoint Petitioner as guardian ad litem under Federal Rule of Civil Procedure 17 (c), and to grant intervention to said petitioner under Rule 24 (b), or in the alternative to grant such other appropriate relief as is deemed equitable by this court in order to protect the rights of the class of unborn viable fetuses in Douglas County, Nebraska, which petitioner is willing and able to represent.

The facts giving rise to the present motion are set forth in detail in the petition annexed, and there are appended to said Petition, in their entirety, the Nebraska Statutes which are being attacked, the Orders of the District Judge denying guardians for the unborn viable fetuses, and the Order of the Circuit Court of Appeals

For the Eighth Circuit denying in all respects the Petition for Writs of Mandamus and Prohibition in that Court.

Mandamus or some extraordinary relief is the proper remedy, and relief is not available in the Federal District Court, the Circuit Court of Appeals, or in any other court save the Supreme Court of the United States.

Trial is set for August 13, 1979, and it is essential that extraordinary relief be granted Petitioner in order to protect her class from irreparable harm that would otherwise follow by leaving the very class for which the Nebraska Statutes clearly seek to protect from being represented at the trial on the merits. Petitioner has made timely application for appointment as a guardian and for intervention, but such relief has been denied on the ground that petitioner's class has no protectable interest, which ruling is contrary to the law of this Court and is gravely prejudicial to the trial on the merits.

Petitioner prays, because of an emergency situation that requires immediate action, that the time for relief be shortened so that the trial of the case will not be held and the constitutionality of the statutes affecting petitioner's class are determined without representation of the class which the statutes are designed to protect. Such time can be shortened pursuant to Supreme Court Rule 35 (4) and the inherent power of the court.

Petitioner seeks appointment as guardian and intervention before the August 13, 1979, trial, and the issue is very clear, i. e., whether unborn viable fetuses have any significant protectable interest, contrary to the ruling of the District Court Judge. Petitioner is prepared to represent her class at the August 13, 1979, trial without requiring further discovery or delaying the trial on the merits. However, in the alternative, if deemed equitable by the court, petitioner prays for a stay of the District Court Proceedings or other injunctive relief, until a proper ruling is made by the District Court pursuant to this Court's direction, regarding the appointment of a guardian ad litem and intervention on behalf of the viable unborn fetuses in Douglas County, Nebraska.

Wherefore petitioner prays that this motion for leave to file be granted, or in the alternative for such other proper relief as deemed fair and equitable by this court.

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PETITION FOR WRITS OF MANDAMUS AND PROHIBITION, OR IN THE ALTERNATIVE FOR A WRIT OF INJUNCTION OR OTHER APPROPRIATE EXTRAORDINARY RELIEF DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

The petitioner by her attorney, John H. Kellogg, Jr., respectfully petitions this Court pursuant to 28 U. S. C. § 1651 and Rules 30 and 31 of The Rules of the Supreme Court, to issue a writ of mandamus and prohibition to require the Honorable The United States District Court for the District of Nebraska and the District Judge assigned to the civil actions presently pending in said District Court, numbered CV79-L-85 and CV79-L-100, to appoint a guardian ad litem for the class of viable unborn infants now before the District Court *en ventra sa mere* as the unborn children of the class of pregnant women previously certified by the District Court and to grant intervention to the guardian ad litem so appointed pursuant to Rules 17 (c) and 24 (b) of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The Order of the United States Court of Appeals, dated July 23, 1979, has not been reported and is reproduced in Appendix A. The Court of Appeals did not render an opinion.

The Memorandum and Order of the District Court, dated April 20, 1979, has not been reported and is reproduced in Appendix B.

The Memorandum and Order of the District Court, dated June 20, 1979, has not been reported and is reproduced in Appendix C.

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JURISDICTION

The subject matter of this Petition consists of two civil actions challenging the constitutionality of portions of the Nebraska Criminal Code concerning abortion.

The Plaintiffs invoked jurisdiction in the District Court under 42 U. S. C. Sec. 1983 and 28 U. S. C. Secs. 1331 and 1343 (1976).

This Petition is proper under Rules 30, 31, 50 and 51 of the Rules of the Supreme Court of the United States. It concerns a justiciable case or controversy within the purview of Article III of the Constitution of the United States. The appellate jurisdiction of this Court exists under 28 U. S. C. Sec. 1651(a) and (b) and 1254(1).

The relief sought in the Petition was denied by the District Court on April 20, 1979 and June 20, 1979 and

by the Eighth Circuit United States Court of Appeals on July 23, 1979.

Petitioner has no other remedy because the trial in the District Court is scheduled to begin August 13, 1979.

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STATUTE INVOLVED

The subject matter of the Petition consists of two consolidated civil actions challenging the constitutionality of portions of the Nebraska Criminal Code concerning abortion.

The portions of the Nebraska Criminal Code relating to abortion consist of Sections 28-325 through 28-345, which have been reproduced in Appendix D.

Said sections of the Nebraska Criminal Code may be found in Nebraska Revised Statutes (Supp. 1978), as amended by LB 316 of the Nebraska Session Laws of 1979.

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QUESTIONS PRESENTED

I. Whether the Respondent United States District Court abused its discretion by denying its authority to appoint a guardian *ad litem* in civil actions challenging the constitutionality of a statute expressly enacted to protect the interests of unborn children?

II. Whether unborn children have significantly protectable interests in the constitutionality of sections of the Nebraska Criminal Code enacted expressly for their protection?

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STATEMENT OF THE CASE

Petitioner seeks to become an Intervening Defendant in the consolidated cases of *Women's Services v. Thone,* CV 79-L-85 and *Ladies Center Nebraska, Inc. v. Thone,* CV 79-L-100, and to be appointed guardian *ad litem* on behalf of certain unborn children in said consolidated cases.

Respondent, United States District Court Judge for the District of Nebraska, denied the motion of Petitioner and others to intervene and for appointment as guardian *ad litem* in said case in an order filed April 20, 1979 (Appendix B) and further denied the motion of Petitioner and others to reconsider said order in a subsequent order filed June 20, 1979 (Appendix C). Petitioner then filed a Petition for Writs of Mandamus and Prohibition to the United States District Court for the District of Nebraska in the Eighth Circuit Court of Appeals. This Petition was denied by the Eighth Circuit United States Court of Appeals on July 23, 1979 (see Appendix A).

Plaintiffs are Betty Roe, by her next friend, Barbara Gaither, Women's Services, P. C., a Nebraska professional corporation, Ladies Center Nebraska, Inc., G. William Orr, M. D. and M. John Epp, M. D., physicians. Plaintiffs allege the unconstitutionality of many of the Nebraska

Criminal Code sections (Appendix D) which regulate abortions and these sections were passed in light of *Roe v. Wade,* 410 U. S. 113 (1973), and subsequent Supreme Court cases which set guidelines concerning states' interest in abortion, and the legislature passed these statutes with diligent concern to conform to the Supreme Court's guidelines and to provide as much protection as possible for the unborn within the Supreme Court's rulings.

The Plaintiffs seek an injunction and declaratory relief to prohibit enforcement of sections of the Nebraska Criminal Code concerning abortion. The sections were enacted in 1977 and amended in 1979 with the express articulated purpose of providing "protection for the life of the unborn child whenever possible." Neb. Rev. Stat. 28-325 (1) (Supp. 1978). The Nebraska Legislature further provided that "it is in the interest of the people of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted . . ." Neb. Rev. Stat. 28-325 (3), as amended (see Appendix D).

The Defendants in each case are the Governor of Nebraska, Charles Thone; the Attorney General of Nebraska, Paul L. Douglas; and the County Attorney for Douglas County, Nebraska, Donald L. Knowles. Petitioner twice moved to intervene as an additional Defendant and to be appointed guardian *ad litem* on behalf of viable unborn children, the precise class crystallized for protection by the Nebraska Legislature in the above-mentioned statute. The District Court twice denied Petitioner's motions on the grounds that the viable unborn have "no significantly protectable interest" and thus cannot have a guardian *ad litem* appointed in this case, based

on the language of *Roe v. Wade,* supra, 410 U.S. 113 (1973), that a fetus is not a Fourteenth Amendment "person."

The above named Defendants in each case do not adequately represent unborn children; they are not adequate defenders of the rights of unborn children as a class. They are defenders of the general populace of Nebraska, some of whom share Petitioner's concern for unborn children. Others do not. There are actual and potential conflicting interests on behalf of persons in the state regarding abortion, such as between the mother and the unborn child in some cases, and the state alone cannot adequately represent the unborn for whose protection the statute was passed. To say the very class which the statute was designed to protect has no "significantly protectable interests" is tantamount to a premature and clearly erroneous disposition of the merits of certain issues in the District Court prior to trial.

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FACTS

In 1977, the Legislature of the State of Nebraska amended the Criminal Code in relation to abortion expressly "to provide protection for the life of the unborn child whenever possible" within the limits of the United States Supreme Court's decision on abortion of January 22, 1973. See Neb. Rev. Stat., Section 28-325, subds. 1, 2 and 4 (Supp. 1978). Cf. *Roe v. Wade,* 410 U. S. 113 (1973) (App. 28).

The Nebraska Legislature made additional amendments in 1979 for the same purpose. The District Court recognized this fact in its opinion (App. 10).

Thus, the Nebraska Legislature sought to protect, in so far as possible, the "life, health and welfare of pregnant women and *unborn human life.*" See Neb. Rev. Stat., *supra,* Section 28-325, subd. [4] (App. 28).

The humanity of the unborn child and the protection of the unborn's interests in life, health and welfare as a human being, in so far as possible, are among the chief articulated legislative purposes of the Nebraska Legislature.

The District Court twice denied motions addressed to its sound discretion to appoint a *guardian ad litem* and permit intervention in order to provide representation for the very same class of unborn infants sought to be protected by the Nebraska Legislature (App. 6-7, App. 24). The Circuit Court of Appeals for the Eighth Circuit has also denied petitioner's petition for a writ of mandamus (App. 1).

Thus, in the two civil actions challenging the constitutionality of Nebraska statutes enacted to protect the unborn, in so far as possible, the unborn have been denied representation before the Court. This is an extraordinary abuse of discretion by the District Court and error by the Circuit Court of Appeals subject to correction under the supervisory jurisdiction of this Court pursuant to the All Writs Act, 28 U. S. Code, Section 1651, and Supreme Court Rule 31. *Schlagenhauf v. Holder,* 379 U. S. 104 (1964); *La Buy v. Howes Leather Co.,* 352 U. S. 249 (1957).

The two motions made by petitioner and addressed to the District Court's sound discretion were made on behalf of *viable* unborn infants (App. 6). Said infants were the children, *en ventre sa mere,* of the class of pregnant women challenging the amended Criminal Code of the State of Nebraska in relation to abortion (App. 20).

To the knowledge of petitioner, this is the first case in the post-*Roe v. Wade* period in which a District Court has felt itself bound *not* to appoint a *guardian ad litem* and permit intervention on behalf of viable unborn infants.

The first opinion in the District Court stated the Court's reasoning, as follows:

> The United States Supreme Court in *Roe v. Wade,* 410 U.S. 113, 158 (1973), said:
>
> > "The word 'person' as used in the Fourteenth Amendment, does not include the unborn."
>
> No significantly protectable interest in the adjudication of the constitutionality of a statute can exist, therefore, on behalf of the unborn. * * * While the status of a fetus may have been uncertain before Roe, it seems to me that the case put to rest any uncertainty. Accordingly, there will be no leave to intervene on behalf of fetuses. (App. 6-7).

Petitioner was surprised by the above-quoted ruling of the District Court because it was at the same time an extraordinary result in view of the Nebraska Legislature's expressed legislative purpose and because it involved an important question of law, inextricably bound up with the merits of the litigation, in terms of the District Court's reasoning in reaching that result.

In holding that the viable fetus had "no significantly protectable interest" in the pending litigation, the District Court inevitably touched on the validity of the Nebraska Legislature's articulated legislative goal.

After careful review and search for precedent for judicial treatment of constitutionally unprotected humans other than the unborn, petitioner made a motion for reconsideration addressed to the District Court's sound discretion under Rule 24 (b) of the Federal Rules of Civil Procedure. Petitioner's argument was as follows:

> **The Relation of the Nebraska Abortion Statute to the Interests of Babies Doe.**
>
> The purpose of the Nebraska Abortion Statutes attacked by the Plaintiffs herein is declared by the Nebraska legislature in Nebraska Criminal Code 28-325(1).
>
> > "Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible."
>
> The statutes attacked seek to fulfill this stated purpose by requiring various safeguards and procedures before an unborn child can be aborted. One section is particularly important to Babies Doe in that it provides that,
>
> > "No abortion shall be performed or prescribed after the unborn child has reached viability except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health." Nebraska Criminal Code 28-329.
>
> Without the protection of these statutes, the interests of Babies Doe in life and survival would be

significantly impaired and therefore Babies Doe have a significant interest in defending the Nebraska Abortion Statutes.

The Language of Roe v. Wade.

In the landmark case of *Roe v. Wade*, supra, the United States Supreme Court held that an unborn child was not a person within the Fourteenth Amendment. At the same time however the Court in *Roe* recognized an "important and legitimate interest in protecting the potentiality of human life", 410 U. S. at 162. In addition the Court recognized that this interest became *compelling* when the fetus reached viability, 410 U. S. at 163. The holding in *Roe* that an unborn child was not a "legal" person, did not dispose of all of the unborn's rights as a human being. Indeed the Court in *Roe* specifically refused to consider this question by stating, "We need not resolve the difficult question of when life begins", 410 U. S. at 159. Therefore, the Supreme Court's decision in *Roe* does not confer any affirmative legal right to take the life of a human being. There is no unqualified constitutional right to an abortion in this country even after the *Roe* decision. As soon as human life is found to exist, the child may be protected by this Court, whether born or unborn. Therefore, unborn viable fetuses in the position of Babies Doe, have a compelling interest in life and survival. Although their rights under the Fourteenth Amendment may, at present, be non-existent, their rights as human beings have not been completely erased by the *Roe* decision.

Right to Life Outside of the Constitution.

Assuming arguendo, that the unborn infant in America is not a constitutional "person" at any gestational age after *Roe v. Wade*, supra, and has therefore been relegated since January 22, 1973, to the status of the African slave in America prior to the adoption of the Fourteenth Amendment, it must be

remembered that the common law prior to the Fourteenth Amendment protected the life of a slave without placing reliance on any constitutional provision.

At common law, even in slave states, a slave was entitled to his life on the grounds that he was a human being:

> ". . . But the master's authority is not altogether unlimited. He must not kill. There is, at the least, this restriction on his power: he must stop short of taking life . . ."

State v. Hoover, 20 N. C. 393 (1839).

> ". . . That a slave is a reasonable, or more properly a human being, is not I suppose denied. But it is said that, being property, he is not within the protection of the law, and therefore the law regards not the manner of his death; that the owner alone is interested and the State no more concerned, independently of the acts of the Legislature on that subject, than in the death of a horse. This is an argument the force of which I cannot feel and leads to consequences abhorrent to my nature; . . .
>
> ". . . and with me it has no weight to slew [sic*] that, by the laws of ancient Rome or modern Turkey, an absolute power is given to the master over the life of his slave. I answer, these are not the laws of our country, nor the model from which they were taken . . ."

State v. Reed, 9 N. C. 454 (1923) [sic**].

The law tolerates slavery, the Court stated:
". . . but (in so doing is also) protecting the life

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*The proper word, as officially reported, is "shew".

**The proper date of the cited case is 1823.

and limbs of the human being; and in these particulars it does not admit that he is without the protection of the law . . ."

State v. Reed, supra, at 457.

"The Court considered, as every enlightened tribunal would do, that the master was bound by the most solemn obligation, to protect and preserve the life of his slave; that he could no more divest himself of this obligation, than could the husband and father the duty of supporting and maintaining the wife or child . . ."

". . . and that consequently, the duty of humane treatment and medical assistance, when clearly necessary, ought not and cannot be withholden by the owner; . . ."

Henry B. Latiner [sic*] *v. James F. Alexander,* 14 Ga. 259 (1852). See also *State v. Hale,* 9 N. C. 582 (1823); *State v. Raines,* 3 McCord (S. C.) 533 (1826); *Southern v. Commonwealth,* 48 Gratton (Gen. Court of Va.) 673 (1851).

Therefore even if the unborn viable fetuses, Babies Doe, are seen as being outside of the protection of the Constitution after *Roe,* there still exists a significantly *protectable interest* in their lives as human beings which can be represented by the movants herein.

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*The proper spelling is "Latimer", as officially reported in 14 Ga. 259.

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ARGUMENT

A. Abuse of Discretion

The answer to the first question presented must be answered strongly in the affirmative, based on the facts of this case, the language of the relevant United States Code Sections, and the previous unambiguous holdings of the United States Supreme Court and the Circuit Court of Appeals for the 8th Circuit and other Circuits.

The language of 28 U. S. C. § 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

As set out in Boskey, 1A *West's Federal Forms,* Chapter 7, *Jurisdiction* under "Extraordinary Writs," Sec. 336, in the comment on page 49,

"In two types of situations mandamus has become almost a standard remedy—even though the situations do not recur too frequently. The first is where a lower court has failed to comply with a mandate of the Supreme Court. . . ."

A leading precedent-setting case in the Eighth Circuit is *Technitrol, Inc. v. McManus,* 405 F. 2d 84 (1968).

In that case the court made it clear, even though denying the issuance of the writ in those circumstances involving a requested transfer of venue, that the writ of man-

damus is the appropriate remedy where the purpose is to confine the lower court to the exercise of prescribed jurisdiction or to compel exercise of proper authority.

Most significantly, the recent Eighth Circuit case of *Caleshu v. Wangelin,* 549 F. 2d 93 (1977), facing the argument that the proper remedy was an appeal from an interlocutory appeal under 28 U. S. C. § 1292 (b), as opposed to mandamus, the court said, in footnote No. 5, on page 96:

> "We reject respondent's contention that mandamus is not available to petitioner because, prior to the filing of this petition the district court had properly certified to this court as a controlling issue of law under 28 U. S. C. § 1292 (b) the same issue that is raised in the mandamus petition. The availability of an interlocutory appeal under 28 U. S. C. § 1292 (b) depends on an assessment of factors that are not free from doubt. (See *A. Olnick and Sons v. Dempster Bros., Inc.,* 365 F. 2d 439, 442-43—2nd Cir. 1966) The grant or denial of mandamus lies within the discretion of this Court. We do not think we are bound to require that petitioner first seek interlocutory appeal where mandamus is clearly an appropriate remedy (See *Technitrol, Inc. v. McManus,* supra, 405 F. 2d at 87-88)."

This same ruling is supported by other recent cases showing that an abuse of discretion in representation should properly be reviewed by writ of mandamus, and that an appeal under 28 U. S. C. § 1292 (b) would be pointless. (See *Ford Motor Co. v. Bisanz Bros., Inc.,* 249 F. 2d 22, 26 (1957), and *Ohio Environmental Council v. U. S. D. C. Southern District,* 565 F. 2d 393 (6th Cir. 1977).)

In *Ford Motor Co.,* supra, the Eighth Circuit stated:

> "We would think that logically a discretionary order denying leave to intervene should be reviewable by mandamus, and not by appeal from the order." 249 F. 2d at 26.

The denial of the motion to reconsider the ruling on the denial of a guardian *ad litem* and for intervention under Rule 24 (b), and the necessity to use mandamus rings true even more in this case where the earlier ruling clearly misapplied a clear decision of the U. S. Supreme Court in *Roe v. Wade* as a grounds for its decision.

The reasoning of the court on timeliness of the motion for reconsideration was clearly arbitrary where the initial motions to appoint a guardian *ad litem* and to intervene were made at the time another intervention was allowed, and where the order denying reconsideration on the ground of untimeliness was made approximately the same amount of time before the then re-scheduled trial (App. 24).

Intervenor-Defendant Schneider was allowed intervention on April 20, 1979, approximately two months before the trial, then scheduled for June 18, 1979 (App. 6, App. 22). At the time of the denial of the motion for reconsideration on June 20, 1979, the trial had been rescheduled for August 13, 1979 (App. 24). Due to rescheduling of the trial, timeliness could not provide a basis for denial of reconsideration of the motion to intervene.

Petitioner showed in her motion that she would not delay discovery on trial on the merits, and the time in filing the motion for reconsideration was reasonable in light of the information needed to meet the Court's arguments on its initial ruling which were clearly contrary to *Roe v. Wade* and subsequent cases.

As set out in the facts and earlier in the argument, *Roe v. Wade,* 410 U. S. 113, clearly set out in the opinion that it did not determine when human life began, and recognized an interest in the life of the fetus which even became "compelling" in later stages. This language was pointed out to the Court in petitioner's motions and briefs, along with numerous post-*Roe v. Wade* cases permitting appointment of a guardian *ad litem* and intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure. The United States Supreme Court clearly did not change the application of the rules as to rights of the unborn to have a guardian appointed or to intervene, and left the precise determination of the time of viability flexible and subject to further clarification and change. (See *Colautti v. Franklin,* U. S. S. C. No. 77-891, Jan. 9, 1979, pp. 6-7, discussing *Roe v. Wade.*) When the State of Nebraska then legislated, according to the precise guidelines of *Roe v. Wade* and subsequent U. S. Supreme Court cases to protect the interests of the unborn and the women with child, as set out clearly in the preamble to the Nebraska statutes pertaining to regulation of abortion and the specific sections following the preamble, it was a clear abuse of discretion to deny representation to the very class of human life which the statute expressly attempted to protect, on the grounds that there was no significantly protectable interest. To fly in the face of the clear language of the U. S. Supreme Court as to compelling interests in the life of the unborn, with numerous cases (at least six in New York alone) appointing guardians after *Roe v. Wade,* was clearly an abuse of discretion where the court said that no significantly protectable interest in the adjudication of the constitutionality of a statute can

exist for the unborn, since they were not Fourteenth Amendment "persons". If the court's reasoning were to be adopted and the class that the statute sought to protect within U. S. Supreme Court guidelines had no protectable interests, the merits of the entire lawsuit are already decided by the court, since the legislation pertains to protecting interests of the unborn as a primary purpose. Indeed, while this Federal District Court decided that there are no protectable interests, with knowledge of U. S. Supreme Court and subsequent lower level federal and state case rulings on guardians for the unborn, the Nebraska Supreme Court in June, 1979, handed down a decision, *Challed et al. v. Douglas, et al.,* case No. 41975, — Neb. — (June 27, 1979) recognizing welfare benefits for the *unborn* as *eligible individuals,* 42 U. S. C. 602 (a) (10), as an optional matter for the states. The unborn clearly have numerous tort, welfare, inheritance and other rights which are so ingrained and long-standing as to be recognized by all courts, similar to the rights of other persons of the past, such as slaves, who have not been considered "persons in the whole sense of the word", (*Roe v. Wade, supra,* 93 S. Ct. at 731) and to say that the unborn have no significantly protectable interests because they are not "persons" within the meaning of the Fourteenth Amendment is a clear abuse of discretion and contradicts the mandate of *Roe v. Wade* and subsequent cases on all levels of Federal and State courts throughout our country. In this case it fits the situation discussed earlier where mandamus has become an almost standard provision for relief which is provided for by the All Writs Section of the United States Code. The methods of appeal ordinarily available become pointless and would clearly be

inadequate, since the class the statute is designed to protect would not be represented at the trial on the merits while the constitutionality of the statute is being adjudicated. It is difficult to see a more clear case of abuse of discretion than the case at hand, and the writ of mandamus must issue to direct the appointment of a guardian ad litem and permit intervention pursuant to the Federal Rules so a just and fair decision may be rendered according to law.

B. Protectable Interests of the Unborn

In a variety of cases, both before and after the *Roe v. Wade* decision, Courts have appointed guardians *ad litem* to represent a class of unborn children and allowed these guardians to intervene to protect their interests:

Dr. Bart Heffernan was appointed guardian *ad litem* to represent a class of unborn children and allowed to intervene on their behalf in *Doe v. Scott,* 321 F. Supp. 1385 (N. D. Ill. 1971). This intervention remained intact throughout the proceedings in the United States Supreme Court.

In *Klein v. Nassau County Medical Center,* 347 F. Supp. 496 (E. D. N. Y. 1972), a guardian *ad litem* for unborn children intervened in a case in which the constitutionality of the exclusion of Medicare payments for nontherapeutic abortions was challenged.

In *Byrn v. New York City Health and Hospital Corp.,* 329 N. Y. S. 2d 722, aff'd 286 N. E. 2d 887, appeal dismissed 93 S. Ct. 1414 (1973), Robert Byrn was appointed guardian *ad litem* for the class of unborn children and allowed to sue as a party plaintiff.

In *Doe v. Doe,* 314 N. E. 2d 128 (1974), the Supreme Judicial Court of Massachusetts appointed a guardian *ad litem* to represent an unborn child in an action to determine whether a husband could enjoin his pregnant wife from having a child. The appointment was not vacated until after argument and a final decree was entered.

In *McRae v. Mathews,* 421 F. Supp. 533 (1976), the Court recognized that the class of unborn children should be represented in a case challenging a medical provision on abortion.

In *Wynn v. Scott,* 449 F. Supp. 1302 (1978), Dr. Eugene Diamond was appointed as guardian of unborn children and intervened as defendant in a challenge to the Illinois Abortion Law of 1975.

As can be seen from these cases, a variety of precedent exists which recognize the unborn's right to representation in cases such as that which is presently before the Court. This trend in the law does not appear to be affected by the decision in *Roe v. Wade,* especially in the absence of an opinion of this Court specifically addressing the question.

Summary dispositions by this Court have provided the only available precedents to guide the lower courts in this area.

This Court's summary affirmance in *Ryan v. Klein,* 412 U. S. 924 (1973), was in the post-*Roe v. Wade* context

and has therefore provided support for the appointment of guardians for the unborn in abortion litigation. Although a summary affirmance of a federal court decision is not an affirmance of the lower court's reasoning, *Fusari v. Steinberg,* 419 U.S. 379 (1975) (Burger, Ch. J., concurring), nevertheless, in view of this Court's supervisory power under the Federal Rules of Civil Procedure, the summary affirmance in *Ryan v. Klein,* has been relied upon as persuasive authority.

This Court's summary dismissal for lack of a substantial federal question in *Byrn v. N.Y.C. Health & Hospitals Corp.,* 410 U.S. 949 (1973), involved a New York State court decision in the post-*Roe v. Wade* context. To the extent that favorable summary dispositions by this Court of state court decisions provide a stronger precedent for the guidance of lower courts, including lower federal courts, *Hicks v. Miranda,* 422 U.S. 332 (1975), the appointment of a guardian for the unborn in that case has also been relied upon by those who argue in favor of such appointments.

Granting the relief requested in this Petition will preserve for review upon final judgment the important questions involved. Such questions escaped review in *Doe v. Bolton,* 410 U.S. 179 (1973), apparently due to the failure of any appeal by the guardian for the unborn in that case. (See *Doe v. Bolton,* 319 F. Supp. 1048, 1055, at note 3.)

C. Satisfaction of Conditions for Issuance of the Writs

The conditions for issuance of writs of mandamus and prohibition by the Federal Circuit Courts of Appeal were

most recently reviewed by the United States Supreme Court in *Kerr v. U. S. District Court,* 426 U. S. 394, 402-404 (1976). Cf. *Will v. Calvert Ins. Co.,* 437 U. S. 655, 661 (1978).

The Circuit Court of Appeals for the Eighth Circuit extensively reviewed such conditions for that Circuit in *Technitrol, Inc. v. McManus,* 405 F. 2d 84, 87-88 (8th Cir. 1968), cert. den. 394 U. S. 997 (1969).

The use of mandamus power conferred on this Court by the All Writs Statute, 28 U.S.C. § 1651, is a proper remedy to correct an erroneous procedural order by a District Court in exceptional circumstances amounting to judicial "usurpation of power" and when a District Court has exceeded "the sphere of its discretionary power". The Eighth Circuit concluded that such circumstances existed in *Caleshu v. Wangelin,* 549 F. 2d 93, 96 (8th Cir. 1977) (writ granted).

Both of the elements in *Caleshu* are present in the case at bar and each element is present in a more compelling way. Thus, mandamus should have been granted by the Eighth Circuit.

The District Court had before it for review a statutte of the State of Nebraska in a case of substantial public importance. It was a "usurpation of power" to declare that the viable fetus has "no significantly protectable interest" when the United States Supreme Court has expressly *declined* to hold that the fetus is *not a* human being, *Roe v. Wade, supra,* at p. 159 and has expressly held that the State's interest in potential life becomes compelling during the period of viability. *Roe v. Wade, supra,* at p .163.

The District Court also exceeded the sphere of its discretionary power by indirectly calling into question the legitimacy of the articulated legislative purpose of the Nebraska Legislature on a procedural motion. The proper procedure in a case challenging an abortion statute is to vacate the appointment of the *guardian ad litem* only if the District Court finds on the merits after the hearing or trial that the fetus does not possess the interests asserted by the guardian. *Klein v. Nassau County Medical Center,* 347 F. Supp. 496, 501 (U. S. D. C., E. D. N. Y.). Affirmed as to guardian sub nom. *Ryan v. Klein,* 412 U. S. 924 and vacated remanded as to New York State and Nassau County *sub nom. Commissioner of Social Services of New York v. Klein,* 412 U. S. 925 and *Nassau County Medical Center v. Klein,* 412 U. S. 925-926 (1973).

The United States Supreme Court's affirmance on direct appeal from the three-judge District Court in *Ryan v. Klein,* supra, was clearly an exercise, as well, of this Court's supervisory power and established the proper procedure for the appointment and *vacatur* of a guardian *ad litem* in the abortion context. Furthermore the Court's holding in *Roe v. Wade,* supra, that there is a compelling interest in the life of the viable fetus make "clear and undisputable" the entitlement in the case at bar to the issuance of the writ by this Court. *Kerr v. U. S. District Court,* supra, at 403.

The grant or denial of mandamus lies within the discretion of this Court. Where, as here, mandamus is clearly the appropriate remedy, there is no requirement in this Court that petitioner first seek statutory *certiorari,* since this would be pointless after the merits of the

case have been decided to the possible detriment of the unrepresented unborn. In this instance it is the most flagrant disregard of the clear mandate of the Supreme Court of the United States known to petitioner, since in effect the District Court has gone far beyond any earlier decision of any court by saying that the unborn have no "significantly protectable interest" and cannot have a guardian appointed since *Roe v. Wade,* this in light of the fact that *Roe v. Wade* and numerous cases since have recognized the interest in the unborn, especially where, as here, the statute seeks to protect that class.

WHEREFORE, petitioner respectfully requests the aid of this honorable Court and prays:

1. That a writ of mandamus be issued out of this honorable Court directing and commanding the Honorable, the United States District Court for the District of Nebraska, and the District Judge assigned to the civil actions presently pending as Nos. CV 79-L-85 and CV 79-L-100 to vacate its orders filed April 20 and June 20, 1979, denying appointment of the petitioner as guardian *ad litem,* to appoint petitioner as guardian *ad litem* and to permit her intervention.

2. That a writ of prohibition be issued out of this honorable Court prohibiting the Honorable, the United States District Court for the District of Nebraska, and the District Judge assigned to the civil actions presently pending as Nos. CV 79-L-85 and CV 79-L-100 from exercising any jurisdiction to conduct further proceedings in said civil actions without first appointing petitioner as guardian *ad litem* and permitting her intervention.

3. That the Court grant petitioner such other and further relief as may be just in the premises, including the stay, if necessary, of the proceeding below pending the proper determination of guardianship, and including the preservation of any rights possessed by petitioner whether or not this writ shall issue.

Respectfully submitted,

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APPENDIX "A"

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1553 September Term, 1978

In Re:

MARY LYONS,

Petitioner.

Petition for Writs of Mandamus and Prohibition.

Before HEANEY, BRIGHT and HENLEY,
Circuit Judges

Petition for writs of mandamus and prohibition has been carefully considered by the Court and is denied in all respects.

July 23, 1979

APPENDIX "B"

(Filed April 20, 1979)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

MEMORANDUM AND ORDER

CV79-L-85

WOMENS SERVICES, P.C., a Nebraska Professional Corporation, and G. WILLIAM ORR, M. D.,

Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska; PAUL L. DOUGLAS, Attorney General for the State of Nebraska; and DONALD L. KNOWLES, County Attorney for the County of Douglas, State of Nebraska,

Defendants.

CV79-L-100

LADIES CENTER, NEBRASKA, INC., a corporation; M. JOHN EPP, M.D.; and BETTY ROE, by her next friend, BARBARA GAITHER,

Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska; PAUL L. DOUGLAS, Attorney General for the State of Nebraska; and DONALD L. KNOWLES, County Attorney for the County of Douglas, State of Nebraska,

Defendants.

These are actions challenging the constitutionality of portions of the Nebraska Criminal Code concerning abortion. The 1977 Legislature of the State of Nebraska passed, as Legislative Bill 38, a series of sections, and the 1979 Legislature amended some of them by Legislative Bill 316. A hearing has been had in both actions simultaneously on motions for a preliminary injunction. Ruling will now be made on these motions, as well as several procedural motions.

PRELIMINARY PROCEDURE MATTERS

Although there has been no motion to consolidate these two actions, my understanding is that counsel agree that they should be consolidated. Accordingly, that will be done. There is a motion to consolidate CV79-L-85 with an action between the same parties regarding L.B. 38, but I think the matters before me presently can more understandingly be handled prior to a consideration of that consolidation.

The plaintiffs in CV79-L-85 have requested in the complaint that there be certified a class of defendants consisting of all county attorneys of the State of Nebraska. I find that Donald L. Knowles, County Attorney for the County of Douglas, Nebraska, will fairly and adequately represent the interests of such a defendant class, that the class is so numerous that joinder of all members is impracticable, and that there exist substantial questions of law and fact common to that class and the defenses of the defendant Donald L. Knowles are typical of the defenses of the defendant class. Accordingly, such a class will be certified.

The plaintiff G. William Orr in CV79-L-85 and the plaintiff M. John Epp in CV79-L-100 ask that a class of plaintiffs be certified, consisting of all duly licensed physicians and surgeons presently performing or desiring to perform pregnancy termination procedures for patients in the State of Nebraska. I find that the class is so numerous that joinder of all such persons is impracticable, that there are questions of law and fact common to the class, that the claims of the representative parties are typical of the class, that the representative parties will fairly and adequately represent the interests of the class, the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole, and the prosecution of separate actions would create a risk of inconsistent or varying adjudication with respect to individual members of the class. Accordingly, such a class will be certified.

The plaintiff G. William Orr in CV79-L-85 and the plaintiff Betty Roe, by her next friend, Barbara Gaither, in CV79-L-100, request certification of a class of plaintiffs consisting of all patients desiring pregnancy terminations within the State of Nebraska. I find that the class is so numerous that joinder of all such persons is impracticable, that there are questions of law and fact common to the class, the claims of the representative parties are typical of the class, the representative parties will fairly and adequately represent the interests of the class, the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole, and the prosecution of separate actions would

create a risk of inconsistent or varying adjudication with respect to individual members of the class. Accordingly, such a class will be certified.

The plaintiff Ladies Center, Nebraska, Inc. in CV79-L-100 requests certification of a class consisting of all organizations which offer and provide facilities and support staff to physicians for the furnishing of services by said physicians to women in the area of termination of pregnancy through abortion. I find that the class is so numerous that joinder of all such organizations is impracticable, that there are questions of law and fact common to the class, the claims of the representative party are typical of the class, the representative party will fairly and adequately represent the interests of the class, the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole, and the prosecution of separate actions would create a risk of inconsistent of varying adjudication with respect to individual members of the class. Accordingly, such a class will be certified.

There are two requests for intervention. Rule 24 of the Federal Rules of Civil Procedure controls. Intervention of right exists "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Permissive intervention may be had "when an applicant's claim or defense and the main action have a question of law or fact in common."

Marilyn A. Schneider seeks to intervene. Joseph McCaslin, James D. Quinn, and Mary Lyons request leave to intervene and for appointment as guardians ad litem on behalf of Babies Doe, unborn viable fetuses living *in utero* in the County of Douglas, State of Nebraska, and on behalf of all unborn viable fetuses in the County of Douglas, State of Nebraska, who are or might be affected by a judgment. I conclude that Marilyn A. Schneider does have a significant protectable interest in being able to consult with her child or children about an abortion decision, if one should need to be made. See *Myer v. Nebraska,* 262 U. S. 390, 399 (1923); *Pierce v. Society of Sisters,* 268 U. S. 510, 534 (1925); *Smith v. Organization of Foster Families,* 431 U. S. 816, 843-844 (1977); *Maher v. Roe,* 432 U. S. 464, 473 (1977). Disposition of this action may impair or impede her ability to protect that interest. The briefs submitted by counsel for the defendants have centered upon the protection of the unborn fetus and the interests of the mother of the unborn fetus, but have not pressed the interests of the parent of the pregnant woman. I think, therefore, it would be wise to have as an intervenor a person who specifically emphasizes the interest of the mother of the pregnant woman. Marilyn A. Schneider will be given leave to intervene.

The United States Supreme Court in *Roe v. Wade,* 410 U. S. 113, 158 (1973), said:

> "The word 'person' as used in the Fourteenth Amendment, does not include the unborn."

No significantly protectable interest in the adjudication of the constitutionality of a statute can exist, therefore, on behalf of the unborn. Cases cited by the applicants

which allowed appointment of a guardian ad litem for the unborn in the abortion context were cases decided before *Roe v. Wade.* While the status of a fetus may have been uncertain before *Roe,* it seems to me that case put to rest any uncertainty. Accordingly, there will be no leave to intervene on behalf of fetuses.

REQUEST FOR PRELIMINARY INJUNCTION

Fennell v. Butler, 570 F. 2d 263 (C. A. 8th Cir. 1978), announced the utilization of alternative tests for the granting or denial of a preliminary injunction. One should issue:

> ". . . upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

Although *Roe v. Wade,* 410 U. S. 113 (1973), *Maher v. Roe,* 432 U. S. 464 (1977), and *Collautti v. Franklin,* — U. S. —, 47 U. S. L. W. 4095 (January 9, 1979), do not provide sure answers to questions of the constitutionality of abortion statutes, the following statements appear firmly established by those cases:

1. The right of a woman to choose without unduly burdensome interferenece whether to terminate her pregnancy is fundamental;
2. The permissible degree of interference in that decision by the state depends upon the severity of the technique used by the state and the nature of the state's interest, which interest grows with the duration of the pregnancy;
3. A state may not impose any direct obstacles—such as criminal penalties—to further its interest

in the potential life of a fetus before viability; and

4. A state has no compelling interest in the potential life of the fetus prior to the fetus' viability.

Two additional cases need to be mentioned: *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52 (1976), and *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (U.S. D.C. E.D. Pa. 1975), affirmed sub nom *Franklin v. Fitzpatrick,* 428 U.S. 901 (1976). In *Danforth,* the statute provided criminal sanctions for performing an abortion during the first twelve weeks pregnancy without a certification by the woman that she consented to the procedure and "that her consent is informed and freely given and is not the result of coercion." That part of the statute was held constitutional. The rationale of the three-judge district court was that the provision ensures that the woman retains control over the discretions of her consulting physician and that the provision was "not burdensome or chilling," manifesting a legitimate interest of the state "that this important decision has in fact been made by the person constitutionally empowered to do so," and did not interpose "the state or third parties in the decision-making process." The Supreme Court said that it did "not disagree with the result reached by the District Court" and explained:

> "The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."

In *Fitzpatrick,* the three-judge district court approved an informed consent provision, which was buttressed by criminal sanctions, requiring the physician or a counselor to advise the pregnant woman (a) that there may be detrimental physical and psychological effects which are not foreseeable, (b) of possible alternatives to abortion, including childbirth and adoption, and (c) of the medical procedures to be used. The decision of that court was affirmed without opinion, the Supreme Court simply citing *Danforth.* The significance of *Fitzpatrick* is open to question because of the Supreme Court's failure to write an opinion and the observation of that court in *Danforth* in footnote 8 that:

> "The appellants' vagueness argument centers on the word 'informed.' One might well wonder, offhand, just what 'informed consent' of a patient is. The three Missouri federal judges who composed the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician to an undesirable and uncomfortable straitjacket in the practice of his profession."

Perhaps it may correctly be said, then, that because the segments of the Nebraska statute under attack here do impose criminal penalties for violation and do apply before viability of the fetus, the prospects of escaping a declaration of unconstitutionality appear to rest upon the questions of whether the particular segment actually is an imposition upon the decisionmaking process and whether any such imposition is for the furtherance of the state's interest in the potential life of the fetus prior to its viability or in furtherance of some other legitimate

interest of the state. The requirement is apparently not unconstitutional if (1) compliance puts no articulable burden upon the decisionmaking process or (2) the burden is not for furtherance of the state's interest in the potential life of the fetus, and is tightly drawn to effectuate only some other legitimate interest of the state.

As to what state interest the particular portions of the Nebraska statute in L. B. 316 are intended to further, the legislature has left no doubt. L. B. 316 left intact Section 28-325 (1), which became operative on January 1, 1979, as a part of L. B. 38 and which declares:

> "(1) That the folowing provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;"

I see no way to avoid taking the legislature at its word. That means that in its application to fetuses before they are viable, as well as after, each of the provisions attacked in these lawsuits is an expression of the will of the state to provide protection for the life of those fetuses. The state has chosen to provide that protection through the harshest of legal measures—laying criminal penalties on those who do not do as the state demands. As explained earlier, that is constitutionally permissible only if in fact the requirement amounts to no discernible burden on the decisionmaking process. Remaining for analysis, then, as to each of the challenged provisions is

the question of whether the specific part of the statute puts any recognizable burden on the decisionmaking process.

Informed Consent

The Nebraska statute, L. B. 316, at § 28-327, prohibits an abortion in the absence of informed consent unless "in the sound medical judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent." Section 28-326 (8) defines informed consent as:

> ". . . a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of posible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician; . . ."

It is probable that there would be a burden upon the woman or her physician or both, if the physician, or even someone under the physician's supervision,[1] were required to advise the woman, not only of possible medical and mental consequences of abortion and the procedures to be used (which was a requirement approved in ***Dan-***

forth, supra, where the motivation of the provision was viewed to be a furthering of the interest in the woman's welfare), but also (1) the possile medical and mental consequences of pregnancy, (2) the possible medical and mental consequences of childbirth, and (3) the possible alternatives to abortion, including (a) childbirth, (b) adoption, (c) presence of agencies and services available to assist her to carry her pregnancy to a natural term. It must be noted that it is not a physician's judgment that is called upon in deciding whether each of the listed pieces of advice is either applicable to or physically or psychologically healthful for the particular patient. It is, rather, the legislature's judgment that each must be given, whether applicable and whether healthful or not. The physician is a key person in the decisionmaking process. To supersede the physician's[2] judgment by requiring the recitation of a litany of state-decreed statements, whether to the patient's medical interest or not, is to impose a genuine burden upon the process. At least, it must be said that it presents a sufficiently serious question to make that issue a fair ground for litigation, and, because criminal sanctions are involved, hardships tip decidedly toward the parties requesting the preliminary relief.

Section 28-333 requires informed consent by a minor under the age of eighteen as a prerequisite to an abortion on her. That provision is subject to the same infirmities as § 28-326 (8).

Waiting Period

The second paragraph of § 28-327 prohibits any abortion "without the passing of at least forty-eight hours between the expression of informed consent and the actual

performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists."

"Emergency situation" means, according to § 28-326 (7), "a condition . . . that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman."

Different from the informed consent provision, this one looks to the judgment of the physician, presumably the physician performing the abortion. Nonetheless, the limitation is a direct obstacle to the making of a decision. It means that, even after a decision to have an abortion has been made, irrespective of how carefully and thoughtfully, the woman must wait for forty-eight hours unless the physician in his good judgment concludes that the patient's health would be adversely affected by a delay. In the absence of a need relating to the woman's health, the abortion would be delayed. That is a burden. During the second trimester the state may regulate abortion procedures in ways that are reasonably related to maternal health, according to *Roe v. Wade,* supra, but this statute applies to the first trimester, as well.

This paragraph, too, presents an issue that is a fair subject for adjudication and the risks tip decidely in favor of the plaintiffs, because of the criminal sanctions.

Consultation

Section 28-333 says in pertinent part:

"No abortion shall be performed on any minor under the age of eighteen in the State of Nebraska without . . . a written statement by her indicating that she

has consulted with her parent or guardian concerning the performance of an abortion, unless an emergency situation exists. The statement of consultation shall be in the following form:

> "I, ..., a minor, have advised my parent(s) or guardian that I am pregnant and contemplating an abortion and have consulted with them concerning the contemplated abortion.'"

During the second trimester, according to *Roe v. Wade,* supra, abortion procedures may be regulated on the basis of maternal health, as the "emergency situation" does. But this consultation restriction is applicable to the first trimester, too. Thus, if consultation is an obstacle, a burden, to the decisionmaker, it goes too far, at least if the pregnant minor is capable of being a decisionmaker.

Consultation probably constitutes such a burden. The requirement applies not merely to minors who have a supportive set of parents but also to a minor who has only an incestuous father who has impregnated the minor. No alternative is left to such a minor. For her, "consulting" with her parent may add an appreciable burden.

Another problem exists: In its early words the statute requires only a consultaiton with "her parent or guardian." But later words require her to sign a statement that she has "advised my parent(*s*) *or* guardian . . . and have consulted with *them* . . ." Either she must consult with both parents or a parent and a guardian or be untruthful when she declares that she has consulted with "them." It must be remembered that we are dealing with a criminal statute, and each word of such a statute is critical.

The issue of constitutionality of the consultation requirement is problematic enough to require a preliminary injunction of its enforcement.

Viability and Fetal Care

Issues concerning viability and fetal care are covered by §§ 28-326 (6), 28-329, 28-330, and 28-331. Section 28-326(6) defines viability as "that stage of human development when the unborn child is potentially able to live outside the womb of the mother by natural or artificial means." Section 28-329 proscribes abortions where "in the sound medical judgment of the attending physician" the fetus "clearly appears to have reached viability." Excepted are those abortions where it is "necessary to preserve the woman from an imminent peril that substantially endangers her life or health." Sections 28-330 and 28-331 provide:

> "28-330. In any abortion performed pursuant to section 28-329, all reasonable precautions, in accord with the sound medical judgment of the attending physician and compatible with preserving the woman from an imminent peril that substantially endangers her life or health, shall be taken to insure the protection of the viable, unborn child."
>
> "28-331. All reasonable steps, in accord with the sound medical judgment of the attending physician, shall be employed in the treatment of any child aborted alive with any chance of survival."

The plaintiffs challenge the viability and fetal care statutes, contending that they are void for vagueness. The standard governing consideration of such a challenge was set out in *Colautti v. Franklin,* supra, as follows:

> ". . . [A] criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contem-

> plated conduct is forbidden by the statute.' . . . or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' . . . is void for vagueness. . . ."
>
> 47 U. S. L. W. at 4097

At this point, I find inherent in the Nebraska definition of viability offered in § 28-326(6) none of the problems which the court in *Colautti* found in the Pennsylvania statute. The definition of viability in § 28-326(6) is consistent, almost to the point of word-for-word identity, with the definition of viability given by the court in *Roe v. Wade,* 410 U. S. at 160. A similar definition was upheld by the *Danforth* decision, 428 U. S. at 63-65. There do not appear to be serious questions going to the merits as regards § 28-326(6), and I shall deny the motion for preliminary injunction for that section.

I shall also deny the motion with respect to §§ 28-329, 28-330 and 28-331. There are no serious questions going to the merits, for the reasons that follow.

Section 28-329 is clearly meant to proscribe abortions after the fetus has reached the stage of viability. This the state can do. The *Colautti* decision reaffirmed the constitutional requirement that viability must be primarily a matter of medical judgment, and § 28-329 does not appear to contravene this requirement. I am disposed to think that there is no ambiguity in § 28-329 as to whether it imports a subjective or objective standard regarding the determination of viability; the phrase "in the sound medical judgment of the attending physician" seems to indicate a subjective standard. I similarly interpret the "attending physician" as the physician who physically performs the abortion. The language "except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health" does raise serious questions on the merits with respect to vagueness. See *United States v. Vuitch,* 402 U. S. 62, 69-72 (1971) (holding a condition that an abortion must be "necessary for the preservation of the mother's life or health" not to be impermissibly vague). The plaintiffs contend that the adjective "imminent," the adverb "substantially," and the noun "peril" are all unclear. Therefore, they maintain, a post-viability abortion for which a physician must make a judgment on grounds that the woman's mental health is substantially endangered by imminent peril will present a difficult decision, because mental health problems are not easily isolated. I conclude that the questioned words in § 28-329 do not raise serious questions on the merits as to vagueness. I further conclude that the fact that acertaining the range of decisionmaking authority conferred by the statute may be difficult does not appear to rise to the constitutional level of a chilling effect on the providing of abortions in those rare cases at the fringe of the section's domain. Finally, the plaintiffs contend that potentiality for life is uncertain under § 28-329; they state that it is unclear whether a doctor would have to forgo the performance of an abortion if a fetus could "survive for one second on a respirator." I am not inclined to accept this argument, because the statute allows the doctor to exercise his "sound medical judgment" regarding viability. Viability is a medical, rather than a legal, judgment. *Colautti,* supra. The statute properly accounts for this.

Section 28-330 contains language similar to § 28-329 and appears to be constitutionally firm insofar as the similarities exist. The language, "all reasonable precautions"

does not seem unconstitutionally vague. See *Doe v. Bolton,* 410 U. S. 179 (1973). Moreover, a plain reading of the instruction that the physician take precautions which are "compatible" with the woman's health would not require the physician to follow procedures which increase in a meaningful way the mortality and morbidity rates for the patient. The plaintiffs argue that §§ 28-329, 28-330, and 28-331 are unconstitutional because they do not explicitly include a scienter requirement. They cite no authority or rationale for this conclusion. I do not see serious questions going to the merits and offhand I know of no authority which would raise serious questions. The preliminary injunction shoud not be granted on this basis.

Considering § 28-331, I doubt that it "presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights," *Colautti,* 47 U. S. L. W. at 4098, sufficient to raise serious questions going to the merits about whether the section is unconstitutionally vague. Reading § 28-331 as a whole, it requires that the physician must only take "all reasonable steps" according to his "sound medical judgment" where a child aborted alive has "any chance of survival." According to his "medical judgment," the doctor must take those steps which are reasonable considering the circumstances.

Record Keeping

Prescribed Abortion

Section 28-343 requires the Bureau of Vital Statistics to establish an abortion reporting form, which shall be used for "every abortion performed or prescribed in this state." The statute then prescribes the items that shall

be included in the form and states that such form "shall include only" those items. None of the items includes information about an abortion "prescribed," as distinguished from "performed." In fact, the two locations in the form required by the previous statute to contain information about prescribed abortions do not now require such information, because L. B. 316 deleted the words "or prescribed" from the present subparagraphs (2) and (3). Failure to eliminate the words "or prescribed" at the beginning of the section, which declares that the reporting form "shall be used for the reporting of every abortion performed *or perscribed* [sic] in this state," leaves the physician in a position of being charged criminally for failing to report a "prescribed" abortion, although the form mandated by the statute, which is to contain only certain information, allows no reporting of abortions prescribed but not performed. That appears to render the statute sufficiently vague to require its being preliminarily enjoined.

Challenge is also made to the extent to which § 28-343 requires reporting of facts of abortions, and to the penalty provided. Accoring to the *Danforth* decision, 42 U. S. at 80-81, a state may maintain records helpful in developing information such as that here required, so long as the record keeping is not abusive or overdone. Information may be collected from women seeking an abortion, even during the first trimester of a woman's pregnancy.

I am inclined to believe that the facts elicited by the reporting form required by § 28-343 are not so excessive or

abusive as to raise serious questions on the merits regarding the constitutionality of that section.

No authority has been cited to the effect that a differential in penalty for differing offenses renders one constitutionally infirm. I shall not preliminarily enjoin the statute, except, as I have indicated, regarding "prescribed" abortions.

IT HEREBY IS ORDERED:

1. That *Womens Services v. Thone,* CV79-L-85, and *Ladies Center v. Thone,* CV79-L-100, are consolidated;

2. That a class of defendants consisting of all county attorneys of the State of Nebraska is hereby certified;

3. That a class of plaintiffs consisting of all duly licensed physicians and surgeons presently performing or desiring to perform pregnancy termination procedures for patients in the State of Nebraska is hereby certified;

4. That the motion of Betty Roe, through her next friend, Barbara Gaither, filing 2 in CV79-L-100, is granted and a class of plaintiffs consisting of all patients desiring pregnancy terminations within the State of Nebraska is hereby certified;

5. That the motion of the plaintiff Ladies Center, Nebraska, filing 10 in CV79-L-100, is granted and a class of plaintiffs consisting of all organizations which offer and provide facilities and support staff to physicians for the furnishing of services by said physicians to women in the

area of termination of pregnancy through abortion is hereby certified;

6. That the motion of Marilyn A. Schneider to intervene as a defendant, filing 6 in CV79-L-85, is granted and leave is granted to Marilyn A. Schneider to intervene, and her answer may be filed within ten days of the date of this order;

7. That the motion of Joseph McCaslin, James D. Quinn, and Mary Lyons for leave to intervene and for appointment of guardians ad litem, filing 9 in CV79-L-85, is denied;

8. That each of the defendants and his officers, agents, servants, employees and attorneys and those persons in active concert or participation with him who receive actual notice of this order by personal service or otherwise are enjoined until trial on the merits and further order of this court from enforcing or otherwise applying any of the following sections of the Nebraska Criminal Code contained in Legislative Bill 316, approved by the Governor March 22, 1979:

§ 28-326(8)

§ 28-327

§ 28-333

§ 28-334

§ 28-343, insofar as it requires the reporting of prescribed abortions

9. That tria to the court on the merits is set for June 18, 1979, commencing at 9:00 a. m.

Dated April 20, 1979.

BY THE COURT

EXHIBIT NOTE: The signature of the District Judge has been omitted pursuant to Rule 19 of the Rules of the United States Court of Appeals for the Eighth Circuit.

Footnote 1/ Some vagueness exists because the statute does not say explicitly who must give the advice. It requires the "attending physician" to sign the certificate that the advice has been given, and an implication is that the physician must give it in order to be able to certify that it has been given.

Footnote 2/ Section 28-327 does not leave to the physician to decide whether informed consent, as defined in § 28-326 (8), would be detrimental to her health. The physician's judgment is given reign only to decide whether an emergency exists, whether the emergency is such to imperil the *life* of the woman, and whether she is unable to give informed consent.

APPENDIX "C"

(Filed June 20, 1979)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

MEMORANDUM AND ORDER

CV79-L-85

WOMENS SERVICES, P.C.,
Plaintiffs,

vs.

CHARLES THONE, et al.,
Defendants.

CV79-L-100

LADIES CENTER, NEBRASKA, INC., et al.,
Plaintiffs,

vs.

CHARLES THONE, et al.,
Defendants.

Joseph McCaslin, James D. Quinn, and Mary Lyons have moved, by filing 42 in CV79-L-85, that the court reconsider its order denying them leave to intervene and be appointed guardians ad litem on behalf of Babies Doe, all unborn viable fetuses in Douglas County, Nebraska.

In my previous consideration of the motion to intervene I reasoned that because a fetus is not a "person" within the context of the Fourteenth Amendment, *Roe v. Wade,* 410 U. S. 113, 158 (1973), a fetus could not have a significantly protectable interest in the adjudication of the constitutionality of a statute. The presence of such an interest is necessary to establish intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure.

I call attention to the condition of Rule 24 that applications for intervention be "timely." Applications will usually be denied as untimely where the litigation has substantially progressed by way of motions, depositions and discovery. 3B *Moore's Federal Practice,* ¶ 24.13[1], at 24-523 (2d ed. 1948). Almost two months have passed since the decision denying intervention, and it appears that a significant amount of depositions have been taken and several motions have been ruled on. The trial is scheduled to begin on August 13, and I hesitate to risk prejudice to any party in preparation for trial. Therefore, the motion to reconsider will be denied as untimely.

With respect to the plaintiffs' motion to compel and for sanctions, filing 39 in CV79-L-85, the following facts may be gleaned from the submitted affidavits: On June 7, 1979, Lawrence Batt and Michael Levy, counsel for the plaintiffs, met with Jerold V. Fennell, counsel for the defendants, and Thomas W. Hilgers, M. D.; counsel for the plaintiffs had arranged this meeting to depose Dr. Hilgers. Prior to the beginning of questioning, Mr. Fennell informed Messr. Batt and Levy that Dr. Hilgers would not testify unless they agreed to pay Dr. Hilgers an expert witness fee of $100.00 per hour. Whether Mr. Fennell had previously informed the plaintiffs' counsel of this condition is disputed. Counsel involved have rescheduled the deposition of Dr. Hilgers for June 21, 1979, at 9:30 a. m., in anticipation of a court ruling on the motion to compel and for sanctions, which counsel for the plaintiffs filed shortly after the meeting of June 7.

Filing 39 seeks a court order directing the deposition of Dr. Hilgers and awarding plaintiffs the expenses of their motion pursuant to Rule 37 of the Federal Rules of Civil Procedure. In general, Rule 37 provides for sanctions against those who unjustifiably resist discovery. 4A *Moore's Federal Practice,* ¶ 37.01[8], at 37-22 (2d ed. 1948). Dr. Hilgers, whose expert qualifications are not contested, is entitled to an expert's witness fee for his time spent while being deposed. The plaintiffs, who benefit from deposing Dr. Hilgers through the answers of an expert to their questions in his area of expertise, logically should bear the cost of that deposition. Because an expert may reasonably seek adequate compensation for his time spent in the deposition, Dr. Hilgers justifiably resisted discovery by refusing to answer questions until he received assurance of such payment. Rule 26 of the Federal Rules of Civil Procedure allows for the compensation of experts.

The defendants contend that Rule 26(b)(4)(C)(i) provides that the plaintiffs, who seek discovery, must bear the cost of a reasonable expert fee for the time Dr. Hil-

gers spends in responding to the plaintiffs' discovery. The plaintiffs, on the other hand, contend that a full reading of subsection (4) reveals that they must pay that expert fee only where they seek to discover "facts known and opinions held . . . acquired or developed in anticipation of litigation or for trial." Thus, they contend, they should have to pay an expert fee only on those portions of Dr. Hilgers' answers which were acquired or developed in anticipation of this trial; those portions could be ascertained only after the taking of the deposition and an examination of its content.

Regardless of the proper interpretation of Rule 26(b)(4), I hold that under Rule 26(c), which empowers the court to "make any order which justice requires to protect a party or person from . . . undue burden or expense," the plaintiffs must pay a reasonable expert fee to Dr. Hilgers for his time spent in the deposition. This is information the plaintiffs seek from Dr. Hilgers; the benefit accrues to the plaintiffs. Dr. Hilgers can make no alternate use of his time, and someone must bear the cost of his expertise. Justice requires that the plaintiffs bear that cost, which I assume will be some reasonable rate per hour.

If the parties are unable to agree on what constitutes a reasonable expert's fee, or rate per hour, that matter may be taken up on motion and affidavits to the court after the deposition has been taken.

IT THEREFORE HEREBY IS ORDERED:

1. That the motion for reconsideration, filing 42 in CV79-L-85, is denied;

2. That the motion to compel and impose sanctions, filing 39 in CV79-L-85, is denied; and

3. That the plaintiffs, as the deposing parties, shall pay a reasonable expert witness fee for time spent by Dr. Hilgers, the defendants' expert, in being deposed.

Dated June 20, 1979.

BY THE COURT

EXHIBIT NOTE: The signature of the District Judge has been omitted pursuant to Rule 19 of the Rules of the United States Court of Appeals for the Eighth Circuit.

APPENDIX "D"

STATUTES INVOLVED

28-325. Abortion; declaration of purpose. The Legislature hereby finds and declares;

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-235 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect life, health, and welfare of pregnant women and unborn human life; and

(5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to

aid in providing proper maternal health regulations nd education.

28-326. As used in sections 28-235 to 28-345, unless the context otherwise requires:

(1) Abortion shall mean an act, procedure, device or prescription administered to a woman, known by the person so administering to be pregnant and performed with the intent and result of producing the premature expulsion, removal, or termination of the human life within the womb of the pregnant woman, except that in cases in which the unborn child's viability is threatened by continuation of the pregnancy, early delivery after viability shall not be construed as an abortion for the purposes of sections 28-325 to 28-345;

(2) Hospital shall mean those institutions licensed by the State Board of Health pursuant to sections 71-2017 to 71-2029;

(3) Physician shall mean any person licensed to practice medicine in this state as provided in sections 71-102 to 71-110;

(4) Pregnant shall mean that condition of a woman who has unborn human life within her as the result of conception;

(5) Conception shall mean the fecundation of the ovum by the spermatozoa;

(6) Viability shall mean that stage of human development when the unborn child is potentially able to live outside the womb of the mother by natural or artificial means;

(7) Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman;

(8) Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician; and

(9) The word signature includes the mark of a person unable to write her name; a mark shall have the same effect as a signature when the name is written by some other person and the mark is made near thereto by the person unable to write her name.

28-327. No abortion shall be performed on any woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medical judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent.

No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists.

28-328. Failure to inform; violation; penalty. Violation of section 28-327 is a Class II misdemeanor.

28-329. No abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health.

28-330. In any abortion performed pursuant to section 28-329, all reasonable precautions, in accord with the sound medical judgment of the attending physician and compatible with preserving the woman from an imminent peril that substantially endangers her life or health, shall be taken to insure the protection of the viable, unborn child.

28-331. All reasonable steps, in accord with the sound medical judgment of the attending physician, shall be employed in the treatment of any child aborted alive with any chances of survival.

28-332. Violation; penalty. Violation of section 28-329, 28-330, or 28-331 is a Class IV felony.

28-333. No abortion shall be performed on any minor under the age of eighteen in the State of Nebraska without her informed consent and a written statement by her indicating that she has consulted with her parent or

guardian concerning the performance of an abortion; unless an emergency situation exists. The statement of consultation shall be in the following form:

I, ..., a minor, have advised my parent(s) or guardian that I am pregnant and contemplating an abortion and have consulted with them concerning the contemplated abortion.

Date.....

Signed.....

The informed consent by the minor and the statement of consultation with the parent or guardian shall be retained as part of the permanent record of the attending physician as evidence of the requirement of consultation for no more than ten years. No person shall disclose any information contained in the informed consent or the statement of consultation, including the identity of the woman seeking the abortion, without the woman's written authorization or pursuant to an order issued by a court of competent jurisdiction. The Legislature hereby establishes a right of privacy in the State of Nebraska for a cause of action against persons making unauthorized disclosure in violation of this act.

28-334. The performing of an abortion without the informed consent or written statement required in section 28-333 when the attending physician knew or should have known that the woman upon whom the abortion was performed was under the age of eighteen or was not married or the unauthorized disclosure of information protected under section 28-333 is a Class I misdemeanor.

28-335. Abortion by other than licensed physician; penalty. The performing of an abortion by any person other than a licensed physician is a Class IV felony.

28-336. Abortion by other than accepted medical procedures; penalty. The performing of an abortion by using anything other than accepted medical procdures is a Class IV felony.

28-337. Hospital, clinic, institution; not required to admit patient for abortion. No hospital, clinic, institution, or other facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the hospital, clinic, institution, or other facility shall inform the patient of its policy not to participate in abortion procedures. No cause of action shall arise against any hospital, clinic, institution, or other facility for refusing to perform or allow an abortion.

28-338. No person required to perform an abortion; no liability for refusal. No person shall be required to perform or participate in any abortion, and the refusal of any person to participate in an abortion shall not be a basis for civil liability to any person. No hospital, governing board, or any other person, firm, association, or group shall terminate the employment or alter the position of, prevent or impair the practice or occupation of, or impose any other sanction or otherwise discriminate against any person who refuses to participate in an abortion.

28-339. Discrimination against person refusing to participate in an abortion; violation; penalty. Any violation of section 28-338 is a Class II misdemeanor.

28-340. Discrimination against person refusing to participate in an abortion; damages. Any person whose employment or position has been in any way altered, impaired, or terminated in violation of sections 28-325 to 28-345 may sue in the district court for all consequential damages, lost wages, reasonable attorney's fees incurred, and the cost of litigation.

28-341. Discrimination against person refusing to participate; injunctive relief. Any person whose employment or position has in any way been altered, impaired, or terminated because of his refusal to participate in an abortion shall have the right to injunctive relief, including temporary relief, pending trial upon showing of an emergency, in the district court, in accordance with the statutes, rules, and practices applicable in other similar cases.

28-342. The knowing, willful, or intentional sale, transfer, distribution, or giving away of any live or viable aborted child for any form of experimentation is a Class III felony. The knowing, willful, or intentional consenting to, aiding, or abetting of any such sale, transfer, distribution, or other unlawful disposition of an aborted child is a Class III felony. This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is to preserve the life or health of the aborted child or the mother.

28-343. The Bureau of Vital Statistics, Department of Health, shall establish an abortion reporting form, which shall be used for the reporting of every abortion performed or prescribed in this state. Such form shall include only the following items:

(1) The age of the pregnant woman;

(2) The location of the facility where the abortion was performed;

(3) The type of procedure performed;

(4) Complications, if any;

(5) The name of the attending physician;

(6) The pregnant woman's obstetrical history regarding previous pregnancies, abortions, and live births;

(7) The stated reason or reasons for which the abortion was requested;

(8) The state of the pregnant woman's legal residence;

(9) The length and weight of the aborted child, when measurable; and

(10) Whether an emergency situation caused the physician to waive any of the requirements of sections 28-327 or 28-333.

The completed form shall be signed by the attending physician and sent to the Bureau of Vital Statistics within fifteen days after each reporting month. The completed form shall be an original, typed or written legibly in durable ink, and shall not be deemed complete unless the omission of any item of information required shall have been disclosed or satisfactorily accounted for. Carbon copies shall not be acceptable. The abortion reporting form required under this section shall not include the name of the person upon whom the abortion was performed. The abortion reporting form required under this

section shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding.

28-344. Reporting form; violation; penalty. Violation of section 28-343 is a Class II misdemeanor.

28-345. The Department of Health shall prepare and keep on permanent file compilations of the information submitted on the abortion reporting forms pursuant to such rules and regulations as established by the Department of Health, which compilations shall be a matter of public record. Under no circumstances shall the compilations of information include the name of any attending physician or identify in any respect facilities where abortions are performed. The Department of Health, in order to maintain and keep such compilations current, shall file with such reports any new or amended information.